No. 9218

In the United States Circuit Court of Appeals for the Ninth Circuit

OCTOBER TERM, 1938

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOS ANGELES BRICK & CLAY PRODUCTS CO.,
RESPONDENT

ON PETITION FOR THE ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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CONTENTS

AUTHORITIES CITED

183781—39——1

Cases—Continued. Page

Board cases:

Statutes:

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JURISDICTION

This case comes before the Court upon the petition of the National Labor Relations Board for the enforcement of an order issued by it against respondent pursuant to Section 10 (c) of the National Labor Relations Act (49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*). Respondent is a California corporation operating a plant at Alberhill, Riverside County, California, where the unfair labor practices occurred.

STATEMENT OF THE CASE

Proceedings before the Board

Upon charges and supplemental charges filed by Alberhill Clay Products Workers' Union No. 373 (hereinafter called the Union), the Board, through its Regional Director at Los Angeles, California, on December 9, 1937, issued its complaint and notice of hearing, which were served upon respondent and the Union.

In addition to jurisdictional allegations the complaint alleged in substance that between June 2 and 10, 1937, the respondent discharged 13 employees, and thereafter refused to reinstate them because they joined and assisted the Union; that on or about June 25 respondent reinstated two named employees but, because of their union membership and activities, reduced their pay and deprived them of rights and privileges which they had previously enjoyed; that on or about June 10 and thereafter respondent refused to bargain collectively with the Union; and that by the foregoing and other acts and conduct respondent had engaged in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 4–14).

A hearing was held at Riverside, California, on December 16, 17, 20, 21, and 22, 1937, before Dwight Stephenson, the Trial Examiner designated by the Board (R. 34–35). The Board and the respondent

were represented by counsel and participated in the hearing. The Union was represented by its international organizer and likewise participated in the hearing. On the opening day of the hearing respondent filed a motion to dismiss the complaint on the ground that the Board had no jurisdiction of the subject matter (R. 31–34). The Trial Examiner denied this motion at the conclusion of the hearing (R. 557). Counsel for the Board, on the first day of the hearing, moved to amend the complaint to include the name of Henry Boontjer among the employees alleged to have been discriminated against. The motion was allowed by Trial Examiner (R. 207). The Board's counsel also moved to dismiss without prejudice the allegations of the complaint as to eleven named persons on the ground that they had failed to appear at the hearing. This motion was allowed by the Trial Examiner (R. 500–502).

On April 30, 1938, the Trial Examiner issued an Intermediate Report, which was filed with the Regional Director and duly served upon all the parties, finding that the respondent had engaged in and was engaging in unfair labor practices, within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 35–59). He recommended that the respondent cease and desist from its unfair labor practices; reinstate, with back pay, certain of its employees found to have been discriminated against in re-

gard to hire and tenure of employment; upon request, bargain collectively with the Union as the exclusive representative of its employees in the appropriate unit; and take certain other appropriate action to remedy the situation brought about by the respondent's unfair labor practices. The Trial Examiner also recommended dismissal of the complaint, as amended, as to M. G. and M. J. Eaglin on the ground that they had failed to appear and testify at the hearing.[1] On May 11, the Union filed exceptions to the Intermediate Report.[2] The Board accorded respondent and the Union an opportunity for oral argument before the Board, but neither party availed itself of the privilege (R. 59). On February 27, 1939, the Board issued its Decision, affirming the rulings of the Trial Examiner and setting forth its findings of fact, conclusions of law, and order (R. 60–103).

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[1] There was no recommendation as to the dismissal of Gregorio Cordero's name from the complaint, although the Trial Examiner failed to find that he had been discriminated against (R. 56–58).

[2] While the Trial Examiner found Chester Lucas and Art Hannum to have been discriminated against in regard to hire and tenure of employment, their names were omitted from his recommendations. No recommendations were made with respect to Sam Dabich whom the Trial Examiner also found to have been discriminated against in violation of the Act (R. 56–58). The exceptions of the Union pertained to these omissions from the Trial Examiner's conclusions and recommendations.

The Board's findings of fact, conclusions of law, and order

Respondent's business. — Briefly, the Board found that respondent is a California corporation engaged in the business of manufacturing, selling, and distributing brick, tile, sewer pipe, and flue lining. Its plant is located at Alberhill, Riverside County, and its principal office is located at Los Angeles, both in the State of California. All respondent's raw materials are procured from sources in California. The gross annual sales of respondent amount to approximately $500,000. During the first 11 months of 1937 its total net sales of finished products amounted to $463,671. Of this amount of finished products, approximately 18.6 percent, valued at about $86,345, were sold for shipment or shipped by the respondent to destinations outside California (R. 66–67).

The unfair labor practices.—The Board found that respondent had discriminated in respect to the reinstatement of 17 named employees who had gone on strike and that respondent had thereby discouraged membership in the Union. The Board also found that respondent prolonged the strike by refusing, on June 15, 1937, and at all times thereafter, to bargain collectively with the Union as the exclusive representative of respondent's employees. By the foregoing conduct the Board concluded that respondent had engaged in and was

engaging in unfair labor practices affecting commerce within the meaning of Section 8 (1), (3), and (5) and Section 2 (6) and (7) of the Act (R. 68–94).[3]

The Board's order.—The Board ordered respondent to cease and desist from refusing to bargain collectively with the Union and from discouraging membership in the Union or any other labor organ-

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[3] The pertinent provisions of the Act are as follows:

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

"SEC. 8. It shall be an unfair labor practice for an employer—

"(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

"(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *

* * * * *

"(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."

ization by discrimination in regard to hire and tenure of employment. As affirmative action which the Board found will effectuate the policies of the Act, the Board required respondent to reinstate with back pay 15 of the employees who had been found to have been discriminated against in reinstatement.[4] The Board further directed that respondent, upon application, reinstate 21 other employees who were on strike on June 15, 1937, the date of respondent's refusal to bargain collectively; and that respondent post appropriate notices (R. 99–103).[5]

SUMMARY OF ARGUMENT

I. The National Labor Relations Act is applicable to respondent and the employees here involved.

II. The Board's findings of fact are supported by substantial evidence. Upon the facts so found,

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[4] Cordero and Dabich, two of the 17 employees found to have been discriminated against, were later reinstated by respondent (R. 91–94). Hence they were not included in the reinstatement order.

[5] The Board's order in full is as follows:

"Upon the basis of the above findings of fact and conclusions of law and pursuant to Section 10 (c) of the National Labor Relations Act, the National Labor Relations Board hereby orders that the respondent, Los Angeles Brick & Clay Products Co., its officers, agents, successors, and assigns, shall:

"1. Cease and desist from—

"(a) Interfering with, restraining, or coercing its employees in the exercise of their rights to self-organization, to

183781—39——2

respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8, subdivisions (1), (3), and (5) of the Act.

III. The Board's order is wholly valid and proper under the Act.

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form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection, as guaranteed in Section 7 of the Act;

"(b) Refusing to bargain collectively with Alberhill Clay Products Workers' Union No. 373 as the exclusive representative of its employees at the Alberhill plant, including the pits, excluding foremen, supervisors, and office employees, in respect to rates of pay, wages, hours of employment, and other conditions of employment;

"(c) Discouraging membership in the Union or any other labor organization of its employees, by discriminating in regard to hire and tenure of employment because of membership in or activity on behalf of the Union or any other labor organization.

"2. Take the following affirmative action, which the Board finds will effectuate the policies of the Act:

"(a) Offer to those employees listed in Appendix 'A,' and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights and privileges, in the manner set forth in the section entitled 'Remedy' above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section, and thereafter, in said manner, offer them employment as it becomes available;

"(b) Make whole the 15 employees named in Appendix 'A' for any loss of pay each may have suffered by reason of the respondent's discrimination in regard to hire and tenure of employment, by payment to each of them, respectively, of a sum of money equal to the amount each normally would have earned as wages from September 1, 1937, to the

ARGUMENT

POINT I

The National Labor Relations Act is applicable to respondent and the employees here involved

The facts upon which the Board based its findings with respect to the nature of respondent's

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date of the offer of reinstatement, less his net earnings during said period; deducting, however, from the amount otherwise due each said employee, monies received by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said projects;

"(c) Upon application, offer to those employees, who were on strike on June 15, 1937, and thereafter, and who are not named in Appendix 'A,' and each of them, immediate and full reinstatement to their former or substantially equivalent positions, without prejudice to their seniority and other rights and privileges, in the manner set forth in the section entitled 'Remedy' above, placing those employees for whom employment is not immediately available upon a preferential list in the manner set forth in said section; and thereafter, in said manner, offer them employment as it becomes available;

"(d) Make whole the employees ordered in paragraph (c) above to be offered reinstatement for any loss of pay they will have suffered by reason of the respondent's refusal to reinstate them, upon application, following the issuance of this Order, by payment to each of them, respectively, of a sum of money equal to that which each normally would have earned as wages during the period from 5 days after the date of such application for reinstatement to the date of the offer of employment or placement upon the preferential list required by paragraph (c) above, less his net earnings during said period: deducting, however, from the amount otherwise due each said employee, monies received

operations are not in dispute. The respondent is engaged at Alberhill, Riverside County, California, in the manufacturing, selling, and distributing of brick, tile, sewer pipe, and flue lining (R. 5, 15). The principal office of respondent is in Los Angeles (*ibid.*). All its raw materials are procured from sources in California (R. 15–16).

Respondent's gross annual sales amount to about $500,000 (Resp. Exh. 5, R. 481). During the first 11 months of 1937, its total net sales of finished products amounted to $463,671 (Resp. Exh. 5, R. 481). Of this amount the respondent sold and delivered to points outside California products valued at $32,149 (Resp. Exh. 7, R. 483–

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by him during said period for work performed upon Federal, State, county, municipal, or other work-relief projects, and pay over the amounts so deducted to the appropriate fiscal agency of the Federal, State, county, municipal, or other government or governments which supplied the funds for said project;

"(e) Post immediately, and keep posted for a period of at least sixty (60) consecutive days from the date of posting, notices in conspicuous places in and about the plant, including the yard and the pits, stating in both English and Spanish that the respondent will cease and desist in the manner set forth in 1 (a), (b), and (c), and that it will take the affirmative action set forth in 2 (a), (b), (c), (d), and (e) of this Order; and

"(f) Notify the Regional Director for the Twenty-first Region in writing within ten (10) days from the date of this order what steps the respondent has taken to comply herewith.

"AND IT IS FURTHER ORDERED that the complaint, insofar as it alleges that the respondent discriminated in regard to the terms and conditions of employment of Sam Dabich, be, and the same hereby is dismissed."

484). Respondent further sold and delivered products valued at $40,771 to purchasers for intended shipment outside California, such intention being set forth on the purchase orders (R. 814, 807, Bd. Exh. 12, R. 491–495). During the same period about $13,425 worth of finished products also were sold and delivered to railroads for intended shipment outside California (Bd. Exh. 14, R. 498–499). Thus, during the period under consideration, approximately 18.6 per cent of the respondent's finished products, amounting to about $86,345 in value, were sold for shipment or shipped by respondent to destinations outside of California.

The Board's findings as to the interstate character of respondent's operations were, as we have pointed out, based in part upon the $54,196 worth of respondent's products purchased by respondent's customers for intended shipment out of the State of California (Bd. Exhs. 12 and 14, R. 491–495, 498). While conceding the accuracy of this figure (R. 490, 497) respondent contends that the Board was not entitled to consider such shipments in determining the question of jurisdiction, on the ground that the record does not show that the products were actually shipped to out of state points (Resp. Exceptions to Intermediate Report, p. 6). The objection, it is submitted, is without merit.

The evidence of intention to ship these products outside of California upon which the Board relied

is the statements of respondent's customers appearing upon their purchase orders (R. 551).[6] Manifestations of intention in the realm of commercial dealing and practice, especially when disinterestedly made, may not be readily ignored. Clearly, an expression of a purpose to make an extra-state shipment, made in the regular course of business and appearing upon an ordinary commercial document, raises a presumption that the intention was carried out.[7] It is important to note that there is not the slightest evidence in the record casting

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[6] While the record does not show the precise purpose for which this information is set forth on the purchase orders, there is reason to believe that the data pertains to the matter of exemption from California's Retail Sales Tax Act (Cal. Stats. 1933, p. 2599 et seq., and amendments), Section 5 of which specifically excludes from the operation of the act sales which the state is prohibited from taxing "under the Constitution or laws of the United States of America * * *," a provision which, of course, applies to sales of goods for shipment in interstate commerce. *Adams Manufacturing Co.* v. *Storen*, 304 U. S. 307, 311–312; *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U. S. 434, 438–439; *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 255. In this view the data as to intended destination appearing on the purchase orders is of an official character and its trustworthiness is correspondingly enhanced. See R. 505–506; cf. Resp. Ex. 5, R. 481.

[7] "The presence of a design or plan to do or not to do a given act has probative value to show that the act was in fact done or not done. A plan is not always carried out, but it is more or less likely to be carried out. The existence of the plan is always used in daily life as the basis of an inference to the act planned. There is no question about the relevancy in general of such evidence." Wigmore, *Evidence* (2d edition), Vol. I, Sec. 102, p. 336.

doubt upon the genuineness of this expression of intention or in any way tending to rebut the presumption that the purchasers who thus signified their purpose to ship out of the state, actually did so. Particularly in view of the entire absence of any contradictory showing, the Board was fully justified in considering these purchases as interstate transactions, and in basing its jurisdictional determination in part thereon.

Upon the facts set out above, the Act is plainly applicable to respondent and the employees here involved. The test of the Act's application to an industrial concern is whether "stoppage of * * * operations by industrial strife" in the enterprise under consideration would result in interruption to or interference with the flow of interstate commerce. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1. If such interruption would occur, unfair labor practices, shown by long experience to be "prolific causes of strife," have the "close and intimate effect" which brings the subject within the reach of the Federal power to regulate commerce among the States (301 U. S. 1, at 38, 42).

The $86,345 worth of finished products which respondent sold for shipment or shipped to points outside California during the period under consideration constitutes a substantial quantity of goods, by any standard. That a cessation of shipments of such magnitude through industrial strife

at respondent's plant would "directly and substantially" affect interstate commerce is clear. The decision of the Supreme Court in *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601, is decisive upon this point. In that case the Act was held applicable to a small manufacturer of women's clothing whose total output was about a thousand dozen garments per month. "Nor do we think it important," said the Court in the *Fainblatt* case—

> that the volume of the commerce here involved, though substantial, was relatively small as compared with that in the cases arising under the National Labor Relations Act which have hitherto engaged our attention. The power of Congress to regulate interstate commerce is plenary and extends to all such commerce be it great or small. *Hanley* v. *Kansas City Southern Ry. Co.,* supra. The exercise of Congressional power under the Sherman Act, the Clayton Act, the Federal Trade Commission Act, or the National Motor Vehicle Theft Act has never been thought to be constitutionally restricted because in any particular case the volume of the commerce affected may be small. The amount of the commerce regulated is of special significance only to the extent that Congress may be taken to have excluded commerce of small volume from the operation of its regulatory measure by express provision or fair implication.
>
> The language of the National Labor Relations Act seems to make it plain that Congress has set no restrictions upon the juris-

> diction of the Board to be determined or fixed exclusively by reference to the volume of interstate commerce involved.

After examining the language of Section 2 (6) and (7), wherein the scope of the Act's application is set forth, the Court went on to say:

> The Act on its face thus evidences the intention of Congress to exercise whatever power is constitutionally given to it to regulate commerce by the adoption of measures for the prevention or control of certain specified acts—unfair labor practices—which provoke or tend to provoke strikes or labor disturbances affecting interstate commerce. Given the other needful conditions, commerce may be affected in the same manner and to the same extent in proportion to its volume, whether it be great or small. Examining the Act in the light of its purpose and of the circumstances in which it must be applied we can perceive no basis for inferring any intention of Congress to make the operation of the Act depend on any particular volume of commerce affected more than that to which courts would apply the maxim de minimis.

Since the more than $80,000 worth of products which respondent shipped or sold for shipment to points outside California obviously cannot be considered trifling, and hence within the maxim *de minimis non curat lex,* it necessarily follows that the protective power of Congress, as embodied in the Act, may properly be extended to respondent

and the employees here involved. The same result follows even if, contrary to the holding of the Supreme Court in the *Fainblatt* case, *supra,* we exclude from consideration the commerce of respondent's customers, and consider only the $32,149 worth of finished products which respondent, in the 11-month period under consideration, itself sold and delivered to points beyond the border of the state. *National Labor Relations Board* v. *Fainblatt,* 306 U. S. 601; *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.,* 91 F. (2d) 790 (C. C. A. 9), affirmed 303 U. S. 453; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. (2d) 633 (C. C. A. 8); *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750 (C. C. A. 4).

The fact that the amount of brick and tile produced by respondent for shipment in interstate commerce is smaller than the amount which remains within the state is of no consequence. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453, 467; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197, 221; *National Labor Relations Board* v. *Crowe Coal Co.,* 104 F. (2d) 633 (C. C. A. 8); *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750 (C. C. A. 4). In the *Santa Cruz* case the Supreme Court held that a concern which shipped 37 percent of its product in interstate commerce was subject to regulation under the Act. In so holding the Court condemned the use of a me-

chanical percentage test in determining whether the Federal power could apply, stating (303 U. S. at 467):

> It is plain that the provision cannot be applied by a mere reference to percentages, and the fact that petitioner's sales in interstate and foreign commerce amounted to 37 percent, and not to more than 50 percent, of its production cannot be deemed controlling.

In the *Consolidated Edison* decision the Court held the Act applicable to the utility companies despite the fact that the "intrastate activities" of the latter were admittedly "predominant" (305 U. S. at 219), and that the interstate aspects of the companies' operations "involve but a small part of the entire service rendered by the utilities" (*Id.,* at p. 221). Had the present respondent produced only the considerable quantity of brick and related products marked for shipment out of the State, it would not be open to question that the requisite "close and substantial" relation to interstate commerce was present. *National Labor Relations Board* v. *Fainblatt, supra.* The relation to commerce is not rendered any less close or substantial because the proper regulation of the interstate aspects of respondent's business necessarily results in the incidental regulation of a larger quantity of intrastate commerce. The governing principle is the supremacy of the federal power within the national field. *Second Employers' Liability Cases,* 223 U. S. 1; *The Minnesota Rate Cases,* 230 U. S.

352; *Houston E. & W. Texas Ry.* v. *United States,* 234 U. S. 342; *Mulford* v. *Smith,* 307 U. S. 38. As the Circuit Court of Appeals for the Fourth Circuit held in *National Labor Relations Board* v. *Planters Mfg. Co.,* 105 F. (2d) 750, 754 (C. C. A. 4):

> The fact that the substantial interstate parts of respondent's business are so closely connected with intrastate aspects, that the regulation of the former is impossible without incidentally regulating the latter, necessarily leads to the extension of the federal regulating power rather than to its restriction.

Similarly, in *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.,* 91 F. (2d) 790 (C. C. A. 9),[8] this Court held:

> * * * *if any substantial percentage of a product produced in a state is produced to enter interstate or foreign commerce, the Congress may regulate its production, insofar as it affects the volume to enter such commerce, though such regulation also regulates a larger percentage of product which does not leave the state.* [Italics the Court's.]

To hold otherwise would deny to Congress the exercise of its constitutional authority, and would be destructive of the fundamental principle of the preeminence of the national government within its appointed sphere. *The Minnesota Rate Cases,*

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[8] Affirmed, *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board,* 303 U. S. 453.

supra; Houston E. & W. Texas Ry. v. *United States, supra,* at 350–352. Having chosen to employ the channels of interstate commerce in the carrying on of its business, respondent may not complain if it is required to comply with reasonable regulations enacted by Congress for the protection of those channels against burdens and obstructions. It is, therefore, submitted that under principle and authority the Act is applicable to respondent and to the employees here involved.

Point II

The Board's findings of fact are supported by substantial evidence.[8] Upon the facts so found, respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8 (1), (3), and (5) of the Act

In order to appreciate fully the significance of respondent's actions in refusing to bargain with the Union, and in discriminating against and refusing to reinstate certain union members, it is necessary to consider briefly some of the precursors of the aforementioned activities.

A. The respondent's attitude toward the Union

About May 1, 1937, Bodine, the plant superintendent (R. 118, 467), told an employee named

[8] Section 10 (e) of the Act provides that "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Under this provision, as this Court has recognized, the Court, in reviewing the findings of the Board, will not make its own appraisal of the evidence, but will

Hazleton that he thought the Union might come in to organize the plant. "In case the Union comes in here," said Bodine, "there won't be no chance for a bonus this coming year like there was last year" (R. 192, 193). He instructed Hazleton to "spread that word around over the yard among the boys there" (*Id*). Bodine admitted having told Hazleton that he thought "the unions would be coming up to visit us" (R. 438), although he denied that he made any statement about the bonus (R. 437). The Board, however, pointing to the prominent part which the superintendent played in other acts of opposition to the Union, did not believe Bodine's testimony with respect to the Hazleton conversation (R. 70). From the entire record it appears that the Board's position was fully justified.

The first attempt to organize the Union began with a meeting of respondent's employees on June

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reverse or modify the Board's findings of fact only if they are not supported by substantial evidence. *Washington, Virginia & Maryland Coach Co.* v. *National Labor Relations Board*, 301 U. S. 142, 147; *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 270, 271; *National Labor Relations Board* v. *Pacific Greyhound Lines, Inc.*, 303 U. S. 272, 275; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. den., 304 U. S. 575; *National Labor Relations Board* v. *Pacific Greyhound Lines*, 91 F. (2d) 458 (C. C. A. 9), reversed in other respects, 303 U. S. 272; *National Labor Relations Board* v. *Hearst*, 102 F. (2d) 658, 661 (C. C. A. 9).

1, 1937 (R. 117). The meeting was attended by 50 to 70 of respondent's employees and 33 of these signed application cards for union membership (R. 196, 237; Bd. Exh. 5). Another union meeting was held on June 25 at which officers were elected and additional membership application cards signed (R. 118–121; Bd. Exh. 5). The organizational drive met with notable success and within a short time over 60 percent of respondent's employees had joined the Union (R. 121, Bd. Exh. 5).

That respondent was fully aware of the efforts of its employees to organize is fully established by the record. Indeed, respondent knew in advance that the meeting of June 1 was to be held (R. 286, 350, 450). Numerous supervisory officials of the respondent attended the meeting. Baer, one of the foremen, testified that he arrived late but remained for about 45 minutes (R. 450, 452). Baer also testified that he saw Superintendent Bodine and the other foremen, Mills and Gantz, at the meeting (R. 452). Although the foremen testified that they left shortly after the first group of men began going up to sign union cards, the record shows that at least 15 or 20 employees signed application cards in the presence of the foremen. (R. 320). Pit Foreman Mills admitted that he remained near or in the vicinity of the meeting until it completely disbanded (R. 372). Baer admitted that he had seen and recognized about

20 of the men who worked under his supervision at the plant (R. 456). None of the foremen had been asked to attend the union meeting (R. 350, 370–371, 450), and Baer admitted that he knew he was ineligible for membership (R. 451); he explained that "we attended to merely see * * * what was going on and what the activity was" (R. 451). A day or two after the meeting Bodine reported to Larson, the general superintendent of respondent's plant, that a union was being formed in the plant (R. 352–353).

On the day following the first union meeting, Foreman Gantz argued with Ashworth, one of his subordinates, during "practically the whole noon hour" in an effort to persuade Ashworth to abandon the Union (R. 228). Gantz repeatedly told Ashworth that the employees should have nothing to do with an "outside" union but should form a union within the plant (R. 228). He further stated that the employees were "fools" to allow themselves to be led by a man such as the union organizer who had been present at the meeting on June 1 (R. 228). Later the same day Gantz came up to Ashworth and another employee named McNutt and remarked, "You fellows are fools to affiliate with the C. I. O. or any outside organization. You should form a union yourselves and stay clear of all outside affiliations" (R. 143–144, 229). Gantz admitted that he had spoken to Ashworth and McNutt about the union on June 2, and that he had told them that "if the union was anything

like the talk the speaker made, I don't think very much of it" (R. 384–385). He also admitted that he had seen McNutt at the union meeting on the evening of June 1 (R. 384). McNutt was laid off on June 3, the day following the conversation referred to above (R. 143). Ashworth was laid off on June 8, after which Gantz again remarked to Ashworth, "the mistake you fellows made from the start was joining up with any outside organization whatsoever. You should have just formed an employees' union here in this one plant and stayed clear of all outside affiliations" (R. 229). The layoffs of Ashworth and McNutt are considered further, *infra*, at pages 32–35.

It is apparent from the above-described conduct of its supervisory employees that the respondent was strongly opposed to the union organization of its employees. The clear antiunion bias thus demonstrated supplies the motive for respondent's subsequent violations of the Act.

B. The refusal to bargain collectively

On or before June 10, 1937, 108 of respondent's employees had signed application cards for membership in the Union and by June 14 ten additional application cards had been signed (R. 143, Bd. Exh. 5). As we have seen, a substantial number had joined the Union at the meeting attended by the foremen (R. 320).

Prior to the beginning of the organizational drive, respondent had announced a general wage

increase, to become effective on June 1 (R. 194, 332–333). On June 2, however, a reduction in force was announced, stated to be for reasons of economy necessitated by slack business conditions (R. 194 Resp. Exh. 2, R. 432). By June 9, 42 employees had been laid off, including a substantial number of members of the Union (Resp. Exh. 1, R. 392; Bd. Exh. 5). One veteran employee testified that never before in his experience had the granting of a raise on one day been followed by a lay-off the next day (R. 189–190, 201). As the result of the lay-offs the Union held a meeting on June 9 and formulated a petition to be presented to the respondent (R. 237–238).

The petition drawn up by the Union requested union recognition, reinstatement of employees laid off after June 1, equitable distribution of work, and time and one-half for overtime (R. 237–238; Bd. Exh. 2, R. 123). A committee of union members gave Bodine the petition at about 7:30 a. m. on July 10. Copies were also distributed at respondent's Los Angeles office (R. 125, 260, 286). The petition gave the respondent until midnight to reply and stated that absence of notification would be deemed a denial of the requests (Bd. Exh. 2, R. 123). Larson, the general superintendent, was given the petition by Bodine about two and one-half hours after the latter had received it (R. 286).

Lucas, one of the members of the union committee (R. 125), testified that later in the day on which the petition was presented, Bodine called him over

to one side of the shop and told him that the men had no means of backing up their demands and that the company would ignore the petition "and wouldn't have anything to do with it" (R. 261–262). Bodine denied that he made the above statement (R. 440), but the Board, upon the entire record in the case and in the proper exercise of its power to pass upon the credibility of witnesses and to resolve conflicting testimony, refused to credit his denial (R. 73). No further word was received from the respondent by the Union and, early the following morning (June 11) the entire force, with the exception of six men, went on strike in accordance with a vote previously taken by the Union (R. 17, 231–232).

On June 15 (R. 463–464, 222–223), after the commencement of the strike, a meeting was held at the office of the Board's Regional Director to discuss the possibility of settling the controversy. The conference was attended by McNutt, secretary-treasurer of the Union, and other union officials, and by Larsen, on behalf of respondent (R. 131–132, 298). McNutt testified that during the meeting Nylander, the Board's Regional Director, asked Larson if he would bargain with the Union (R. 133). Larson replied that he "would never have a union in his plant if he had to close it down for good," and, pointing at McNutt and another of the union representatives, declared, "those two men [will] never go back to work in [my] plant under any circumstances" (R. 133, 283). As a re-

sult of Larson's intransigent attitude, the attempt at settlement was unsuccessful (R. 178–179).

Larson's version of the conference was that he had met with Nylander, the Regional Director, and Howard, a Field Examiner for the Board, and that they told him the strike was illegal and that they would attempt to have it called off (R. 296–297, 339). He admitted that he had not offered to bargain with the union representatives at the meeting (R. 290), but denied having threatened to close the plant (R. 290). Larson's testimony concerning the conference was such as to throw considerable doubt upon the reliability of his denial. Thus, he testified that he had had two conferences with Nylander and Howard; and that the conference which was attended by the Union representatives and concerning which McNutt testified that Larson had threatened to close the plant rather than recognize the Union, was the last of the series and was held on June 23, two days before the termination of the strike (R. 298–299). Larson testified later that the last conference was held on or about June 28 (R. 340–341).

Other evidence establishes conclusively that the conference referred to by McNutt at which the union representatives were present took place on June 15 and not on June 23 or 24, as Larson testified (R. 462–464). Indeed, respondent's counsel so stipulated (R. 222–223). In view of the contradictions in Larson's testimony and his admission that he made no response to the request to bargain

with the Union, the Board was well warranted in disbelieving Larson and in crediting McNutt's testimony as to what was said at the June 15 conference in the Regional Director's office (R. 74–75).

After the June 15 meeting the Union continued its efforts to induce respondent to negotiate. On June 16 the Union sent a letter to the respondent asking it to select a time and place for a meeting with the Union (R. 127, Bd. Exh. 3, R. 128). Like the previous petition, this letter went unanswered (R. 130). Larson himself testified that at no time did he attempt to meet or negotiate with the men (R. 287–289). In significant contrast is the testimony that Baer, the foreman, told Art Hannum, an employee who was about to leave the plant to join his striking fellow union members, that if the employees had formed a "company union in there or the A. F. of L. that Mr. Larson would have come around and talked business with us but he didn't like the C. I. O. policies" (R. 302). Baer was one of respondent's witnesses but he did not controvert the testimony of Hannum as to this incident (R. 445).

On the same day on which the Union dispatched its unheeded letter requesting a collective bargaining conference, respondent began to rehire employees. During the course of the strike 59 striking employees accepted respondent's offers to return to work (Resp. Exh. 1, R. 392–395). The Union, considering its situation hopeless, thereupon voted to terminate the strike on June 25 (R. 148).

On that day, the Union again wrote to respondent, asking that the Union members, whose names it submitted, be reemployed in order of seniority (R. 134; Bd. Exh. 4, R. 137). Respondent again ignored the Union's communication and, on June 28, began to hire new employees (Resp. Exh. 1, R. 392).

Respondent's principal defenses against the Board's finding that it refused to bargain collectively with the authorized representatives of its employees are that the June 10 petition of the Union did not give the Company sufficient time in which to act, and that neither Bodine nor Larson had authority to deal with the Union (R. 75–76). As to the latter point, the record shows that Larson was general superintendent of all respondent's operations, and was the largest stockholder and a director of the Company (R. 330). Larson admitted, moreover, that as general superintendent he had authority to meet and confer with the representatives of the employees, and thereafter to consult with respondent's Board of Directors as to the granting of any of the Union's demands (R. 331). There is not the slightest evidence that Larson ever consulted higher authority with respect to the Union's demands. On the contrary, the evidence points inescapably to the conclusion that respondent's labor relations rested entirely in the hands of Larson, respondent's general superintendent, director, and majority stockholder, and Bodine, the plant superintendent.

The contention that respondent lacked sufficient time in which to determine its position with respect to the Union's demands is likewise unconvincing. Conceding, *arguendo,* respondent's contention that the June 10 demands set an unreasonable limit of time in which the respondent might accept or reject them, it is clear that the argument does not justify the refusal to bargain after the strike was called.[9]

As we have seen, in addition to the June 10 petition in which the Union set forth specific requests and asked for a reply, the Union had requested negotiations in its communications of June 16 and 24 (*supra,* 27, 28). Respondent, however, although the size of the picket line (R. 232, 243, 287) was visible evidence that the Union represented a majority of the employees (cf. *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138, 142 (C. C. A. 9)), made no attempt to bargain collectively with the Union at any time. Instead, its

[9] The existence of the strike did not, of course, terminate the men's status as employees for purposes of the Act (Section 2 (3); *National Labor Relations Board* v. *Mackay Radio, etc., Co.,* 304 U. S. 333) or absolve the respondent of its duty to bargain collectively with the employees' representatives. *Black Diamond Steamship Corp.* v. *National Labor Relations Board,* 94 F. (2d) 875 (C. C. A. 2), cert. den. 304 U. S. 579; *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F. (2d) 134 (C. C. A. 4), cert. den. 302 U. S. 731; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. den. 304 U. S. 575; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9).

general superintendent flatly proclaimed that it would prefer to close down entirely rather than have the Union in the plant (*supra,* p. 25).

Upon these facts the Board had no alternative except to find that respondent, on June 15, 1937, and thereafter, refused to bargain collectively with the Union in violation of Section 8 (5) of the Act (R. 98).

C. The lay-offs and the refusals to reinstate

The complaint, as amended, alleged that respondent had violated Section 8 (3) of the Act by discriminatorily discharging certain named employees prior to the strike and thereafter refusing reinstatement to them and to others of the strikers because of their union membership and activity (R. 6–7). The Board found that the discharges or lay-offs were not discriminations as to hire or tenure of employment in violation of Section 8 (3) (R. 78). It found, however, that the respondent had violated the Act by its refusal to reinstate certain of the strikers. The record fully supports this finding.

On June 25, the day on which the strike was terminated, the Union sent to the respondent a petition, requesting reinstatement in order of seniority of 118 named striking employees (R. 134, 146, Bd. Exh. 4, R. 137). Thirty-six employees, all but four of whom were named in the Union's petition for reinstatement (Bd. Exh. 4, R. 137–141) have not been reinstated by respondent, among them the 15

employees named in the complaint, as amended.[10] In addition to applying for reinstatement through the Union's petition, all but two [11] of the fifteen had applied in person to Bodine for reinstatement after the strike (R. 136, 173, 185, 206, 213–214, 234, 253, 264, 270, 275, 280, 303, 469).

Respondent contends that there was a decrease in the volume of its production in June, and that consequently it reduced its personnel (R. 79). Nevertheless, it appears that following the strike respondent added to its pay roll a substantial number of employees. On June 25, the day the strike ended, respondent had on its pay roll 66 employees (Resp. Exh. 1, R. 392); on June 30 there were 101 men employed by the Company (Resp. Exh. 9, R. 510); at the end of July there were 142 [12] (Resp. Exh. 9, R. 510); and by August 31, 153 employees were on respondent's pay roll (R. 350, 421, Resp. Exh. 9, R. 510). Bodine admitted that by September 1 the plant was carry-

[10] William Ashworth, Henry Boontjer, Frank German, Lawrence German, James Grier, Arthur Hannum, Edward Hannum, Lester Hazleton, Chester Lucas, Lawrence McNutt, Arnold Moss, Sylvester Osborne, Thomas Roddy, Glenn Stewart, and Gerald Wenker. It will be recalled that the complaint was dismissed on motion of the Board's attorney as to 11 additional employees who failed to appear at the hearing (*supra*, p. 3).

[11] The two employees who did not apply in person were Hazelton and Wenker.

[12] Bodine, testifying from records in his possession, stated that the number employed at the end of July was 146 rather than 142 (R. 349).

ing on practically the same operations as on June 1 (R. 422), and that respondent was employing in September only 12 or 13 fewer men than it had engaged in May, the peak month of the year (R. 350, 422, Resp. Exh. 9, R. 510). Furthermore, from June 25, the date on which the strikers applied for reinstatement, through August 31, the respondent hired 30 new employees (Resp. Exh. 1, R. 392).

It is apparent, therefore, that respondent could have reinstated by September 1 all but two of the 32 strikers who had applied for reinstatement. Nevertheless, respondent did not rehire a single one of the 32.

We shall now discuss individually the cases of the 15 strikers whom the Board found to have been discriminatorily refused reinstatement, and whom the respondent urges were denied reinstatement for cause. It is submitted that the evidence fully supports the Board's finding that the only "cause" for which these union members were penalized by respondent was their union affiliation and activity.

D. The discriminatory refusals to reinstate individually considered

Lawrence McNutt, William Ashworth, and *Henry Boontjer* were employed as kiln workers under Foreman Gantz (R. 150, 224–225, 204, 382). McNutt was secretary-treasurer of the Union (R. 120); in his official capacity he had signed all the

communications sent to the respondent by the Union (Bd. Exh. 2, R. 123; Bd. Exh. 3, R. 128; Bd. Exh. 4, R. 137); and he was one of the union representatives at the meeting held in the Regional Director's office on June 15 (R. 176–177). It was at this meeting that Larson pointed to McNutt and said that he would never come back to work in his plant under any circumstances (*supra,* p. 25, R. 133). His foreman admitted having seen him at the Union organizational meeting of June 1 and told him at the time of his lay-off that the quality of his work had nothing to do with his dismissal (R. 165, 384). When McNutt applied for reinstatement Bodine rejected his application and told him that "he would much rather I [McNutt] stayed completely off the property" (R. 136).

Ashworth and McNutt had been told by Gantz that they were "damn fools to join the C. I. O." and that "The mistake you fellows made from the start was joining up with any outside organization whatever" (R. 143–144, 229). Bodine subsequently told Ashworth when the latter applied personally for reinstatement that he had better "forget the Los Angeles Brick Company" (R. 234). Ashworth testified he understood this to mean that, as a result of his union membership and activities, it was useless to attempt to get further employment with the respondent (R. 235).

Boontjer's name was on the list which the Union sent to respondent the day the strike ended and he

also applied in person two or three weeks after the strike (R. 206, Bd. Exh. 4, R. 137). Although Bodine told him that respondent was not putting on any more men (R. 207–208) the record establishes plainly that new employees were engaged from June 25 through August 31 (Resp. Exh. 1, R. 392).

The work performed by these men required no special skill (R. 166) and no question as to their competency appears to have been raised during the period of their employment prior to the strike. Gantz, however, stated at the hearing that McNutt was "too light for the job" (R. 428). Bodine assigned a different reason for not reemploying McNutt, viz., that McNutt, apparently a college graduate, was qualified for a better job than those which were being offered to the new men (R. 412). He admitted, however, that he had made no attempt to find out from McNutt whether he would accept one of these jobs (R. 412). In the case of Ashworth, Bodine said that the new men were performing different work than that which Ashworth had done (R. 405), but admitted that Ashworth could have been assigned to one of these jobs if he had so requested (*id.*). Ashworth was one of those on whose behalf the Union had requested reinstatement (R. 138), and Bodine knew how to get in touch with Ashworth (R. 406); nevertheless, he made no attempt to communicate with him (R. 405). Boontjer, too, was allegedly not offered one of the

general labor jobs because respondent "didn't think he was qualified" (R. 413).

In view of the resumption of substantially normal operations by respondent on September 1, and the undoubted availability of jobs (*supra,* pp. 31–32, 34), the Board was fully justified in rejecting the unconvincing pretexts advanced by respondent for not restoring these men to their former jobs or offering them other positions.

Frank German and *James Grier* were employed as truck drivers by respondent (R. 272, 278). Both men had received raises in salary while employed by respondent (R. 274, 278). Both were union members and attended meetings of the Union (R. 273, 278–279). They were active on the picket line during the strike and testified that they were seen on the picket line by the foremen as the latter went to and from the plant (R. 275, 279).

Bodine testified that German was not reinstated because only general labor jobs were available and because he had the "impression" that German had left the vicinity (R. 417–418). There appears to be no sound reason, though, why German, who had worked as a general laborer for respondent as well as in the capacity of truck driver, could not have been offered one of the general labor jobs, admittedly available (R. 278).

Respondent's contention is that Grier was discharged prior to the strike on account of his inefficiency and that he was denied reinstatement for

the same reason (R. 377). This contention fails completely to square with the facts that Grier was exceeded in seniority by only one other driver in respondent's service (R. 273), and that Mills, respondent's pit foreman (R. 370), gave Grier a letter of recommendation at the time of his lay-off, stating that "I have at all times found him a reliable man" (Bd. Exh. 8, R. 380). Bodine, too, admitted that he had given Grier a letter of recommendation (R. 410–411). A new truck driver was employed by respondent after the termination of the strike, without any offer being made to Grier to restore him to his former job or to another position (R. 373).[13]

The Board correctly concluded that respondent's contentions as to its alleged reasons for not reinstating German and Grier were lacking in conviction.

Arnold Moss, Thomas Roddy, and *Sylvester Osborne* were employed as general laborers (R. 183, 210, 268). Osborne had attended the union meet-

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[13] The Board, upon adequate evidence (see Bd. Exh. 8, R. 380) found that Grier was not *discharged* prior to the strike, but was merely laid off on account of a reduction in force (R. 83). It is not disputed that employees so laid off prior to the strike retained their status as employees. See *Matter of Kuehne Mfg. Co.*, 7 N. L. R. B. 304, 323; cf. *Nashville C. & St. L. Ry.* v. *Railway Employees Dept. of A. F. of L.*, 93 F. (2d) 340 (C. C. A. 6), holding that under the Railway Labor Act of 1934 (45 U. S. C., title 45, ch. 8) temporarily laid off or "furloughed" employees are eligible to participate in an election to determine collective bargaining representatives.

ings on June 1 and 5, and Roddy and Moss were on the picket line (R. 187, 212–213, 269). Baer told Moss when he laid him off that he was a good worker and would be called again for employment (R. 268). A new man, however, was hired in Moss' place (R. 410). Bodine's only explanation of this action was that it was done "because of the nature of the job" (R. 410). Osborne, too, according to Superintendent Bodine, was not rehired "because of the nature of the work" (R. 417). The inadequacy of this explanation becomes apparent when it is observed that the available work, as Bodine admitted, consisted of manual labor (R. 417) and that both Osborne and Moss had worked as laborers for respondent (R. 183, 210). It also appears that at the time Osborne applied for reinstatement, Bodine told him that he had better look some place else for a job, adding, "You boys be careful what kind of paper you sign after this" (R. 186).[14]

Bodine first testified that Roddy was not reengaged because of inefficiency (R. 407). Later, the following colloquy occurred:

> Q. Did you give Mr. Roddy a letter of recommendation?
>
> A. [By Mr. Bodine.] I believe I did; yes, sir.

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[14] Bodine's remark was reasonably interpreted by the Board as a reference to Osborne's signing of a union membership card and as coupling the refusal to reinstate with this union activity (R. 80–81).

Q. Did I understand you to testify just a minute ago that Mr. Roddy's work was not satisfactory?

A. Well, I was getting him mixed up with another man.

Q. Well, now, let us get this clear about Mr. Roddy. Was his work satisfactory or not satisfactory?

A. As far as I know, his work was satisfactory (R. 407).

Upon the evidence reviewed above, the Board was fully justified in rejecting the reasons assigned by the respondent for its failure to reinstate Moss, Osborne, and Roddy.

Lawrence German and *Chester Lucas* were mechanics on the general maintenance crew (R. 251, 257). They had both received several raises in wages while in the employ of the respondent (R. 251, 257–258). Lucas had participated in the drafting of the Union's collective-bargaining demands (R. 259), and was a member of the committee that had presented the demands to Bodine on June 10 (R. 260–262). Both men were active on the picket line (R. 252–263). These two men, who had participated prominently in all the union activities at the plant, are the only members of their crew who are not now in respondent's employ (R. 255). Although Bodine testified that no one had taken Lucas' place (R. 403), the record shows that one new employee (Baer) was hired and one employee (Hall) was transferred to work on the crew after

the strike (R. 254–255), Resp. Exh. 1, 292–395). Both Lucas and German had greater seniority than Hall (Resp. Exh. 1, 392–395). Bodine stated that he had the impression that German had gone back to the Dakotas (R. 417–418), but it does not appear that the superintendent ever investigated as to the whereabouts of German or attempted to communicate with him (R. 417–418). As a matter of fact, the record shows that German applied twice for reinstatement and was in the vicinity of the plant for a period of time sufficient to have afforded respondent ample opportunity to reinstate him (R. 253–254, 255–256).

Glenn Stewart had last worked for respondent as a leverman on the steam press (R. 467); he had received several pay raises during his period of employment with respondent (R. 467). Stewart was one of the union men who presented the June 10 petition to Bodine (R. 468). At the time Stewart applied for reinstatement Bodine, according to Stewart, "waved his hands" and said he (Stewart) had "got off on the wrong foot" (R. 469–470, 476–477). Respondent offered no explanation of its failure to reinstate Stewart.

Gerald Wenker worked for the respondent as a transfer man for 8 months prior to the strike (R. 318–319). There had been no complaints about his work and he had received several raises in wages (R. 319). Although Superintendent Bodine testified that Wenker was not reemployed because

his job "had not yet become a steady one" (R. 411), he admitted that Wenker had started in respondent's plant as a general laborer; that general laborers had been hired since the strike; and that Wenker had not been offered a job as general laborer (R. 411).

Edward Hannum was elected president of the Union on June 5, 1937 (R. 169). Two days later he was laid off by respondent (*id*). At the time his employment terminated Hannum was working on the "dry press" (R. 167). In addition to being president of the local, Hannum was in charge of the picket line during the strike and was one of the union representatives at the meeting in the Regional Director's office (R. 169, 171, 172). During his two years in respondent's employ he had received three raises in salary (R. 167), and Bodine had commended his work highly (R. 168). Bodine testified that Hannum's job, owing to decreased production, had not been filled (R. 413). The Board pointed out, however (R. 85), that there is considerable interchange of jobs and classifications at respondent's plant, and that the union president had worked at numerous jobs for respondent, including general labor (R. 167). Bodine conceded that Hannum was not offered a job as general laborer when he applied for work (R. 413).

Arthur Hannum was on the union delegation which took the Union's petition to the respondent on June 10 (R. 125). He was a burner on the tunnel kiln at the time of the strike but remained on

duty until relieved by Foreman Baer (R. 230).[15] Baer, who was qualified to tend the kiln, testified that when he took it over everything was in satisfactory condition and that he thanked Hannum for remaining and thus preventing damage (R. 455).

On June 25, the day on which the Union abandoned the strike, Hannum asked Bodine for reinstatement, a request which was refused on the ground that respondent was not going to start the tunnel kiln (R. 303). By the first week in August operation of the kiln had been resumed (R. 418). The superintendent testified that Hannum was not reemployed because he had heard that he had left the vicinity by August 7 (R. 418).[16] He added that, notwithstanding this fact, he had no intention of reinstating Hannum to his former position because Hannum had been found sleeping while on duty (R. 418–419). Respondent did not contend that Hannum's dereliction disqualified him for one of the available general labor jobs, a type of work which Hannum had previously done for respondent (R. 300).

It appears that Hannum fell asleep for only ten minutes and that no damage was occasioned

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[15] It was on this occasion that Baer told Hannum that he thought if the men had either a company union or the A. F. of L., Larson would have talked business, but that Larson was opposed to the policies of the C. I. O. (R. 302, *supra*, p. 27).

[16] Hannum left the vicinity of respondent's plant on July 14 (R. 303–304).

thereby (R. 305, 307–308). Significantly, Hannum was neither discharged nor otherwise disciplined for the offense (R. 344). When queried as to why Hannum had not been penalized for his action, Larson testified that he had taken the matter up with Baer and that they were trying to find a man to take Hannum's place when the strike occurred (R. 344). Later, however, Larson testified that the reason Hannum was not discharged at the time of the incident was because the kiln was to be shut down in 15 or 18 days and the Company did not wish to break in a new burner for that length of time (R. 443–444). Baer, although called as a witness, did not testify regarding the discussions with Larson.

The inconsistency in Larson's statements, taken in conjunction with the Board's finding (R. 74–75) that the general superintendent was not a reliable witness, justified the Board in rejecting Larson's explanation of the failure to rehire Hannum, and in concluding that "respondent regarded Hannum's dereliction as minor; * * * the gravity now asserted for the incident is an afterthought" (R. 87).

Lester Hazleton had worked for respondent continuously since 1929 (R. 189–190). We have previously referred to Hazleton as the employee to whom Bodine suggested that he spread the word around that there would be no Christmas bonus if the Union came into the plant (*supra,* p. 20, R. 192). Hazleton's refusal to carry out Bodine's

instructions (R. 194) was calculated to incur the enmity of the superintendent and to proclaim Hazleton a union sympathizer. Bodine testified that he had not reinstated Hazleton because he understood that Hazleton had obtained another job and because he believed that it would be "humiliating" for Hazleton to work at a lower rate of pay than he had formerly received (R. 412). Bodine gave no explanation of why Hazleton's rate of pay would have been decreased. Further, there is no showing that Hazleton's former position was abolished or that his work was assigned to other employees after the strike. The contention that Hazleton was inefficient cannot be taken seriously, the record showing that for at least two years prior to the hearing there had not been the slightest complaint about Hazleton's work (R. 198). The Board justifiably found that "no credible reason has been advanced for not taking back Hazleton" (R. 86).

Respondent argues that the charge of discrimination against the 15 employees referred to above is rebutted by the fact that members of the Union other than these 15 were reinstated. It is a complete answer to this contention that respondent could not have avoided the necessity of restoring some of the union men unless it had been willing to replace three-fourths of its old, experienced employees with new, untried workers, thus endangering the successful operation of its plant. Moreover, it is obvious that the wholesale replacement of all union members would have made the fact

of discrimination nakedly apparent. Respondent's purpose, the discouragement of membership in the Union, was susceptible of accomplishment by less drastic means.

Equally unsound is the contention that respondent could not have been expected to assume the burden of soliciting employees to return to work. This argument ignores the fact that the Union had sent respondent a petition for reinstatement of its members and that there were in addition numerous individual applications by the men themselves. Respondent was well aware that the strikers were available for reemployment at the time it commenced the hiring of new employees (R. 403), and respondent's deliberate rejection of its old, experienced employees in favor of new men is explainable only as a penalty against those union members who were denied reinstatement and as a significant warning to those who were taken back.

In addition to the allegations with respect to the 15 employees dealt with above, the complaint alleged that the respondent had discriminated in regard to the hire and tenure of employment of *Grėgorio Cordero* and *Sam Dabich* in refusing them reinstatement after their application on June 25. Cordero and Dabich were not reinstated until July 7 (Resp. Exh. 1, R. 394, 395).

Cordero's name was on the list submitted to respondent by the Union on June 25 (*supra,* p. 30). In addition, Cordero, who had been temporarily

laid off on June 3 (R. 216), applied personally to Bodine for reinstatement on or about July 1 (R. 217). Cordero testified that Bodine told him to return in a few days; that he did so return and that Bodine then told him he would not be reinstated because he (Bodine) had received reports that Cordero "was making a lot of trouble in the case of the Union" (R. 218). Cordero thereupon brought Bodine a letter to prove that he was not active in the strike but had been temporarily employed elsewhere (R. 218). Bodine reinstated Cordero the day following the production of the letter (R. 218).

The superintendent testified that the letter furnished by Cordero had nothing to do with his reinstatement and that the delay in reinstatement was caused by the fact that Bodine had learned that persons residing in the "company camp" had complained to the deputy sheriff about Cordero's loud talking (R. 420). Bodine admitted that he had never investigated the alleged complaints and there was no evidence introduced to show that complaints actually were made (R. 421).

In view of the fact that the alleged complaints about Cordero could have had no bearing upon his qualifications as a truck loader [17] (R. 215), and of the further fact that, in the words of the Board's

[17] *Vide* the fact that at the time Cordero was laid off Gantz gave him a letter of recommendation and told him that he would be very glad to put him back to work when business picked up (R. 216).

decision, there was "doubtful fortuity" in Bodine's sudden abandonment of his refusal to reinstate Cordero following production of proof that he did not actively participate in the strike, the Board was fully justified in rejecting Bodine's version of Cordero's reinstatement and concluding that the employee had faithfully described the circumstances surrounding his reengagement (R. 91).

Dabich had worked for the respondent for 11½ years (R. 312). When, on or about June 30, he applied to Bodine for reinstatement, the superintendent simply waved his hand, giving no explanation other than that there was "nothing doing" (R. 313). Subsequently, Dabich went to Larson and said, "Maybe we made a mistake. How's chances to go back to work?" (R. 317). Larson thereupon told him that he would be put on the next morning (R. 317). Dabich's testimony was not denied by Larson at any time in the course of the hearing. The "mistake" to which Dabich referred was the employees' union activity and efforts at self-organization and, as the Board found (R. 92), Larson unquestionably so understood. Although Bodine had general charge of all hiring and firing (R. 348), Larson did not hesitate to reverse Bodine's refusal to reinstate Dabich at once upon the latter's "repentance" for his association with the Union. On these facts, therefore, the Board correctly found that Dabich, like Cordero, was "initially denied reinstatement, and that [his] reinstatement was de-

layed, because [he] joined and assisted the Union" (R. 93).[18]

E. Recapitulation

The evidence, reviewed above, clearly supports the Board's finding that respondent, by numerous acts condemned by the statute, interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in the Act. Respondent's close scrutiny of the organizational efforts of its employees; the clear warnings against affiliating with outside organizations; the attempt to frighten prospective adherents away from a union by threatening to cancel the employees' bonus; the refusal to accord the Union the dignity of recognition or to treat with it as the collective-bargaining representative of respondent's employees; the deliberate denial of reinstatement to numerous union men, including the leaders of the Union, following the strike, despite the existence of available work;

[18] The Board stated that, "while the evidence does not show the specific jobs which were available for Cordero and Dabich when their reinstatement was first refused, we conclude, as in the cases of the 15 strikers named above, in the absence of a showing to the contrary, that they were qualified for positions which new employees were hired to fill between June 25, the date of the written application, and July 7, the date that Cordero and Dabich were reinstated." The Board's conclusion was well supported by the fact that both Cordero and Dabich were subsequently reinstated to jobs different from their former positions (R. 311, 314–315, 215, 221), "for no other reason than that the respondent became convinced that neither employee would menace its objective to defeat the Union" (R. 93).

and the remarkable willingness to reinstate employees who confessed their "error" in seeking to exercise their organizational rights, demonstrate convincingly respondent's profound hostility to the self-organization of its employees and its determination not to permit the Union to obtain a foothold in its plant.

Point III

The Board's order is wholly valid and proper under the act

A. The cease and desist provisions

Paragraph 1 (a), (b), and (c) of the Board's order (note 5, pp. 7–10, *supra*) commands desistance by respondent from the unfair labor practices in which it was found to have engaged, including its illegal refusal to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit. Such cease and desist orders are mandatory under Section 10 (c) of the Act. (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.,* 303 U. S. 261, 265), and have uniformly been approved by the Supreme Court and by this and other Circuit Courts of Appeals. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, and companion cases; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333; *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U. S. 197; *National Labor Relations Board* v. *Santa Cruz Fruit Packing Co.,* 91

F. (2d) 790 (C. C. A. 9), aff'd 303 U. S. 453; *National Labor Relations Board* v. *Biles-Coleman Lumber Co.,* 98 F. (2d) 18 (C. C. A. 9); *National Labor Relations Board* v. *Oregon Worsted Co.,* 96 F. (2d) 193 (C. C. A. 9); *National Labor Relations Board* v. *American Potash & Chemical Corp.,* 98 F. (2d) 488 (C. C. A. 9), cert. den., 306 U. S. 643; *National Labor Relations Board* v. *Carlisle Lumber Co.,* 94 F. (2d) 138 (C. C. A. 9), cert. den., 304 U. S. 575; *National Labor Relations Board* v. *National Motor Bearing Co.,* decided 105 F. (2d) 652 (C. C. A. 9).

B. The affirmative provisions

The provisions of the order directing respondent to reinstate with back pay the employees found to have been discriminatorily refused reinstatement, with reimbursement for wages lost by reason of respondent's discrimination, and the placement upon a preferential list of those employees for whom employment is not immediately available, are authorized and appropriate means of effectuating the policies of the Act, which the Board, in the exercise of the discretionary power conferred by Section 10 (c), was fully warranted in requiring. Like orders have been sustained by the Courts in a multitude of cases. See, e. g., *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1; *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 348; *National Labor Relations Board* v. *Fainblatt,*

306 U. S. 601; *National Labor Relations Board* v. *Carlisle Lumber Co.*, 94 F. (2d) 138 (C. C. A. 9), cert. den. 304 U. S. 575; *National Labor Relations Board* v. *American Potash & Chemical Corp.*, 98 F. (2d) 488 (C. C. A. 9), cert. den. 306 U. S. 643; *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 F. (2d) 652 (C. C. A. 9); *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 F. (2d) 862 (C. C. A. 2).

The similar order of reinstatement to the strikers who were the victims of respondent's unlawful refusal to bargain collectively, with back pay from the date of respondent's refusal to reinstate them, upon application, following the issuance of the Board's order, is likewise proper. Such orders have been sustained in all the pertinent cases, including *National Labor Relations Board* v. *Biles-Coleman Lumber Co.*, 98 F. (2d) 18 (C. C. A. 9); *National Labor Relations Board v. Oregon Worsted Co.*, 96 F. (2d) 193 (C. C. A. 9); and *Jeffery-DeWitt Insulator Co.* v. *National Labor Relations Board*, 91 F. (2d) 134 (C. C. A. 4), cert. den. 302 U. S. 731. Cf. *Black Diamond S. S. Corporation* v. *National Labor Relations Board*, 94 F. (2d) 875 (C. C. A. 2), cert. den. 304 U. S. 579.

The order contains the usual provision for the posting of appropriate notices. *National Labor Relations Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261; cases cited *supra*.

CONCLUSION

It is respectfully submitted that the National Labor Relations Act is validly applicable to respondent, that the Board's findings are supported by substantial evidence, and that a decree should issue affirming and enforcing said order in full as prayed in the petition.

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OCTOBER 1939.

U. S. GOVERNMENT PRINTING OFFICE: 1939